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No.

IN THE

Supreme Court of the United States

October Term, 1982

EUGENE H. EUSTER, SAMUEL FIERAMOSCA, DANIEL LOPEZ, DAVID HASBANY and MARTIN J. FALLON, JR.,
Petitioners

v.

PENNSYLVANIA HORSE RACING COMMISSION; ANDREW R. JOHNSON, Chairman, and A. MARLYN MOYER and WILLIAM D. GROSS, Commissioners,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Is the action of the Pennsylvania Horse Racing Commission in promulgating a rule specifying jockey fees, pursuant to and in accordance with its power to "supervise generally" horse racing in Pennsylvania, *ipso facto* exempt from the federal antitrust laws in the absence of affirmative and express language indicating legislative contemplation of such action?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	1
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	1
JURISDICTION	1
STATUTE INVOLVED	1
STATEMENT OF THE CASE	2
A. Statement of the Facts	2
B. The Proceedings Below	2
REASONS FOR GRANTING THE WRIT	5
A. The Decision of the Court of Appeals for the Third Circuit Below Is in Conflict With Decisions of the Courts of Appeals for Other Circuits	5
B. The Ruling Below Is in Conflict With Decisions of This Court	8
C. The Petition Presents an Important Question of Federal Law Which Should Be Specifically Addressed by This Court	11
CONCLUSION	14
APPENDIX:	
Opinion of the United States Court of Appeals for the Third Circuit Filed May 17, 1982	A1
Memorandum of Decision of the United States District Court for the Eastern District of Pennsylvania Filed July 9, 1981	A14
Judgment of the United States Court of Appeals for the Third Circuit Filed May 17, 1982	A21
Order of the United States Court of Appeals for the Third Circuit Denying Rehearing Filed June 24, 1982	A23

TABLE OF AUTHORITIES

Cases: Page

California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U. S. 97 (1980) 3, 4, 6, 12, 13

City of Lafayette v. Louisiana Power & Light Co., 532 F. 2d 431 (5th Cir. 1976), aff'd, 435 U. S. 389 (1978) 6, 8

City of Lafayette v. Louisiana Power & Light Co., 435 U. S. 389 (1978) 3, 10

Community Communications Co., Inc. v. City of Boulder, 102 S. Ct. 835 (1982) 8, 9, 10

Corey v. Look, 641 F. 2d 32 (1st Cir. 1981) 7

Gilligan v. Pennsylvania Horse Racing Comm'n, 46 Pa. Commonw. Ct. 595, 407 A. 2d 466 (1979), *rev'd*, 492 Pa. 92, 422 A. 2d 487 (1980) 2

Gilligan v. Pennsylvania Horse Racing Comm'n, 492 Pa. 92, 422 A. 2d 487 (1980) 3, 4, 7

Goldfarb v. Virginia State Bar Ass'n, 421 U. S. 773 (1975) 8, 10, 11

Parker v. Brown, 317 U. S. 341 (1943) 2, 3, 10, 11, 12, 13

Ronwin v. State Bar of Arizona, 1981-2 Trade Cas. (CCH) ¶ 64,414 (9th Cir. 1981), *withdrawn and reh. granted*, July —, 1982 ..... 6, 7, 12

United States v. Kagama, 118 U. S. 375 (1886) 10

United States v. Texas State Bd. of Public Accountancy, 464 F. Supp. 400 (W. D. Tex. 1978), *aff'd as modified*, 592 F. 2d 919 (5th Cir.), *cert. denied*, 444 U. S. 925 (1979) .. 6, 13

United States v. Texas State Bd. of Public Accountancy, 592 F. 2d 919 (5th Cir.), *cert. denied*, 444 U. S. 925 (1979) .. 5

TABLE OF AUTHORITIES (Continued)

Statutes and Rules: Page

Sherman Act, § 1, 15 U. S. C. § 1 ..... 1, 2
15 U. S. C. § 15 2
15 U. S. C. § 26 2
28 U. S. C. 1254(1) 1
Tex. Rev. Civ. Stat. Ann. Art. 41a § 5 (Vernon 1969) 5
F. R. Civ. P. 12(b)(6) 2
F. R. Civ. P. 56 3
Pennsylvania Rule of Racing 9.15 ..... 2, 3, 4

Miscellaneous:

Opinion of the Attorney General of Vermont, Opinion No. 24-80, 1979-2 Trade Cas. (CCH) ¶ 62,912 (September 6, 1979) 13

Opinion of the Attorney General of Delaware, Opinion No. 80F-006, 1980-1 Trade Cas. (CCH) ¶ 63,259 (March 20, 1980) 13

Page, *Antitrust, Federalism and the Regulatory Process: A Reconstruction and Critique of the State Action Exemption After Midcal Aluminum*, 61 B. U. L. Rev. 1099 (1981) 9

Trade Reg. Report (CCH) No. 542 (May 17, 1982) 13

OPINIONS BELOW

The opinion of the Court of Appeals, attached hereto in Petitioners' Appendix ("P. App.") at P. App. A1, is reported at 677 F. 2d 992, 1982-2 Trade Cas. (CCH) ¶ 64,734 (3d Cir. 1982). The opinion of the District Court, attached hereto at P. App. A14-A20, is not reported.

JURISDICTION

The judgment of the Court of Appeals (attached hereto at P. App. A21-A22) was entered on May 17, 1982; the petition for rehearing was denied on June 24, 1982 (P. App. A23). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

STATUTE INVOLVED

The statute involved, § 1 of the Sherman Act, 15 U. S. C. § 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . .

STATEMENT OF THE CASE

A. Statement of the Facts

In 1967, Pennsylvania legalized pari-mutuel betting on thoroughbred horse racing. In the same year, the Pennsylvania Horse Racing Commission (the "Commission") was established by the Pennsylvania Legislature to regulate racing on which pari-mutuel betting was conducted. The Rules of Racing adopted by the Commission in 1968 included Rule of Racing 9.15, which prescribed a schedule of fees to be paid jockeys (the "Rule").

Ten years later, the Jockeys' Guild, Inc., an association composed of jockeys, requested that the Commission amend the Rule to reflect the new, significantly higher jockeys' fee schedule which had been agreed upon by the Guild's membership. The Commission adopted the revised fee schedule as requested by the Guild.

In 1979, petitioners brought the instant action challenging the amendment of the Rule under, *inter alia*, § 1 of the Sherman Act, 15 U. S. C. § 1. The district court properly exercised jurisdiction over this matter pursuant to 15 U. S. C. §§ 15 and 26.

B. The Proceedings Below

Shortly after the instant action was filed, respondents moved to dismiss the antitrust count of petitioners' Complaint pursuant to F. R. Civ. P. 12(b)(6) on the ground, *inter alia*, that the amendment of the Rule was exempt under the "state action" doctrine first recognized by this Court in *Parker v. Brown*, 317 U. S. 341 (1943). The district court denied that motion, relying in part on the decision of the Commonwealth Court of Pennsylvania in *Gilligan v. Pennsylvania Horse Racing Comm'n*, 46 Pa. Commonw. Ct. 595, 407 A. 2d 466 (1979), which held that the Commission had exceeded its authority under state law when it promulgated the Rule.

In September of 1980, the Supreme Court of Pennsylvania reversed the Commonwealth Court's decision in the *Gilligan* case, holding that the Commission had the power, under state law, to promulgate the Rule. *Gilligan v. Pennsylvania Horse Racing Comm'n*, 492 Pa. 92, 422 A. 2d 487 (1980). Respondents then renewed their motion (styled as a motion for summary judgment) for dismissal of the instant action, again on the basis of the *Parker* doctrine.

The district court granted summary judgment in favor of respondents pursuant to F. R. Civ. P. 56 on the ground that the action was barred by the "state action" doctrine. Recognizing that the appropriate test for the application of the state action exemption is that set forth in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U. S. 97 (1980),[1] the district court concluded that the Rule was exempt, or, more precisely, that the respondents were immune from the antitrust laws with regard to the adoption of the revised fee schedule. The heart of the lower court's opinion—concerning the first prong of the *Midcal* test—was the court's citation of and reliance on the Pennsylvania Supreme Court's opinion in *Gilligan*.

The Court of Appeals affirmed the district court's grant of summary judgment in favor of the respondents. Finding the district court's ruling "amply justified" by the Pennsylvania Supreme Court's opinion in *Gilligan*, the Court of Appeals concluded that respondents' amendment

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1. In *Midcal* this Court held that its decisions established a two-pronged test for immunity under *Parker*. "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." *Midcal* at 105 (*quoting City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. 389, 410 (1978) (opinion of Brennan, J.)).

of the Rule was exempt from antitrust scrutiny by virtue of the state action doctrine.

The Court of Appeals' analysis regarding the first prong of the *Midcal* test consisted of two steps. First, the Court of Appeals noted that under *Gilligan*, the Commission undoubtedly had the power to enact the Rule as a matter of state law, because it was within the "broad supervisory powers" and "general rule making power" which were "clearly and unmistakably conferred" by the legislature. 677 F. 2d at 994 (P. App. A6) (*quoting Gilligan*, 492 Pa. at 96, 97, 422 A. 2d at 489, 490). Second, the Court of Appeals concluded that the promulgation of the Rule met the first prong of *Midcal* because it was "clearly contemplated by the legislation in question." 677 F. 2d at 995 (P. App. A7).[2]

2. The Court of Appeals' opinion quotes (as did the district court) the following passage from *Gilligan*: "[t]he imposition of a jockey fee schedule is simply part of a comprehensive scheme of regulation consistent with—indeed, necessary to accomplish—these legislative goals." 677 F. 2d at 995 (P. App. A7) (*quoting Gilligan*, 492 Pa. at 98, 422 A. 2d at 490-91). Petitioners conceded below that if it could be established that the Rule was in fact "necessary to accomplish" the goals of the legislature, then legislative contemplation of the Rule could be inferred. Petitioners argued, however, that this factual assertion in *Gilligan* could not control the instant action for a variety of reasons (See note 5, *infra*); they suggested that if respondents' defense was predicated upon "necessity," a genuine dispute of fact precluded summary judgment.

The Court of Appeals did not address these arguments, but rather suggested that this factual inquiry would be irrelevant and improper: "[t]he state action doctrine was developed to avoid this sort of inquiry by federal courts into state legislative wisdom. In *Parker* itself, for example, the Supreme Court did not inquire into the necessity for, or wisdom of, the California marketing programs . . . ." 677 F. 2d at 997 (P. App. A12). Although this discussion misses the mark (since petitioners do not question "state legislative wisdom"), the significant point is that it is apparent, given this discussion of the relevance of "necessity," that the Court of Appeals did not base its decision on this "fact."

REASONS FOR GRANTING THE WRIT

A. The Decision of the Court of Appeals for the Third Circuit Below Is in Conflict With Decisions of the Courts of Appeals for Other Circuits.

The decision of the Court of Appeals should be reviewed by this Court because it conflicts with decisions of other Courts of Appeals. In particular, the decision below in the instant action conflicts with *United States v. Texas State Bd. of Public Accountancy*, 592 F. 2d 919 (5th Cir.), *cert. denied*, 444 U. S. 925 (1979).

In *Texas State Board*, the Court of Appeals for the Fifth Circuit affirmed, on the basis of the lower court's opinion, a determination that Rule 14 of the Texas State Board of Public Accountancy was not exempt by virtue of the state action doctrine. The Board was a state agency; its acknowledged power to enact rules regulating accountants in Texas was derived from § 5 of the Texas Public Accountancy Act of 1945, which provided in relevant part that the Board "may promulgate, and may amend from time to time, rules of professional conduct appropriate to establish and maintain a high standard of integrity in the profession of public accountancy." Tex. Rev. Civ. Stat. Ann. Art. 41a § 5 (Vernon 1969). Nevertheless, the district court held (and the Court of Appeals affirmed) that Rule 14 was not entitled to exemption:

> In the instant case Rule 14 is not mandated by any state regulation or action. Section 5 of the Accountancy Act is cast in permissive, not mandatory, language, and, furthermore, only allows adoption of Rules appropriate for maintenance of high standards of integrity in the Accountancy profession. Nowhere in the Act does the State as sovereign mandate the

> anticompetitive conduct required by Rule 14, nor is such policy dictated by the State. Additionally, it cannot be said Section 5 of the Act in any way concerns or contemplates "the kind of action complained of" here.

United States v. Texas State Bd. of Public Accountancy, 464 F. Supp. 400, 404 (W. D. Tex. 1978), *aff'd as modified*, 592 F. 2d 919 (5th Cir.), *cert. denied*, 444 U. S. 925 (1979). Over the dissent of Judge Gee, the Court of Appeals adopted the district court's opinion with only a slight modification in the relief granted.[3]

As in *Texas State Board*, the relevant legislation in the instant action is silent as to the restraint alleged. Nevertheless, the Court of Appeals for the Third Circuit has concluded that the restraint is "contemplated" by the "legislation" because it is permissible as a matter of state law, and therefore the first prong of the *Midcal* test is met. This result is clearly in conflict with *Texas State Board*, which suggests that the question is not whether the restraint is "contemplated by the legislation," but rather whether it is contemplated by the state as sovereign, *i.e.*, by the legislature.[4]

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3. There is also conflict between the decision below and the Fifth Circuit's decision in *City of Lafayette v. Louisiana Power & Light Co.*, 532 F. 2d 431 (5th Cir. 1976), *aff'd*, 435 U. S. 389 (1978). The Fifth Circuit held in that case that a "subordinate state governmental body is not *ipso facto* exempt from the operation of the antitrust laws." 532 F. 2d at 434 (footnote omitted).

4. *Ronwin v. State Bar of Arizona*, 1981-2 Trade Cas. (CCH) ¶ 64,414 (9th Cir. 1981), *withdrawn and reh. granted*, July —, 1982 also conflicts with the decision of the Court of Appeals in the instant action. Although the panel decision in that case can no longer be said to contribute to a conflict among the Courts of Appeals, because it has been withdrawn, its reasoning clearly parallels that of the Court of Appeals for the Fifth Circuit in *Texas*

There is also tension, if not direct conflict, between the decision of the Court of Appeals for the First Circuit in *Corey v. Look*, 641 F. 2d 32 (1st Cir. 1981), and the analysis of the Court of Appeals in the case at bar. In *Corey v. Look*, the Court of Appeals reversed a lower court determination that an alleged agreement between two public entities was exempt from antitrust attack. The Court held that:

> Although "specific, detailed legislative authorization" is "not . . . necessarily" required, . . . we think that, absent explicit language, the political subdivision claiming exemption must illustrate the requisite state legislative intent by demonstrating by convincing reasoning that the challenged restraint is necessary to the successful operation of the legislative scheme that the state as sovereign has established.

Id. at 37. Of course, no demonstration of "necessity" was made in the instant action, or in the state court decision by which the Third Circuit purports to be guided.[5] *See* note 2, *supra*.

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4. (Cont'd.)

State Board, with slightly different emphasis. *See Ronwin v. State Bar of Arizona*, 1981-2 Trade Cas. (CCH) ¶ 64,414 (restraint not immune in the absence of a clear articulation adopting the restraint by the state policymaker, as opposed to a subordinate state agency).

5. The *Gilligan* appeal arose from denial of a motion for judgment on the pleadings. The issue of "necessity" was not before the Pennsylvania Supreme Court, and there was no record before either the court or the Commission which could have supported such a finding. In any event, petitioners, who were not parties in *Gilligan*, could not be bound by a finding of fact in that action.

B. The Ruling Below Is in Conflict With Decisions of This Court.

The decision of the Court of Appeals is in conflict with decisions of this Court pertaining to the state action exemption, notably *Goldfarb v. Virginia State Bar Ass'n*, 421 U. S. 773 (1975) and *Community Communications Co., Inc. v. City of Boulder*, 102 S. Ct. 835 (1982). Furthermore, the nature of the decision is such that it will have significant impact beyond the bounds of the instant action.

The Third Circuit effectively ruled below that a rule promulgated by a state commission which is within that commission's authority as a matter of state law is *ipso facto* exempt from the application of the antitrust laws. The logic of the proposition is beguiling. If a rule is within the commission's power it must be "contemplated by the legislation"; if the rule is "contemplated by the legislation," then the legislature must have "contemplated the kind of action complained of." *See City of Lafayette v. Louisiana Power & Light Co.*, 532 F. 2d 431, 434 (5th Cir. 1976), *aff'd*, 435 U. S. 389 (1978). The Third Circuit goes on to conclude that if the legislature "contemplated" the alleged restraint in this way, then the first prong of the test set forth in *Midcal*—that the "challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy' "—is met.

This argument was rejected by this Court when made on behalf of a municipality in *Boulder*. This Court noted that "[a]cceptance of such a proposition—that the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances—would wholly eviscerate the concepts of 'clear

articulation and affirmative expression' that our precedents require." 102 S. Ct. at 843.[6]

The Court of Appeals in the instant action attempted to distinguish *Boulder* in a footnote:

> The recent Supreme Court decision in *Boulder* is not controlling here . . . . In this case, we are faced with the question whether a state agency, not a municipality, is entitled to the *Parker* exemption when it acts within its authority under state law . . . .

677 F. 2d at 996, n. 6 (P. App. A9). The Court goes on to suggest that the distinction between the instant action and *Boulder* is that the Commission in the instant action acted "within the *sovereign authority* of the Commission under *state* law." *Id.* (emphasis in original).

The City of Boulder also made this argument, suggesting that under state law it acted "as the state," *i.e.*, with sovereign authority, in local affairs. Apparently accepting this proposition *arguendo*, this Court nevertheless rejected the argument as follows:

> As this Court stated long ago, all sovereign authority "within the geographical limits of the United States" resides either with "the Government of the United States, or [with] the States of the Union. *There exist within the broad domain of sovereignty but these two.* There may be cities, counties, and other organized bodies with limited legislative functions, but they are

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6. In a recent, thorough analysis of these issues, Professor William H. Page has concluded, "Clear articulation cannot refer to vague language in a legislative history or a statutory preamble . . . ." *Antitrust, Federalism and the Regulatory Process: A Reconstruction and Critique of the State Action Exemption After Midcal Aluminum*," 61 B. U. L. Rev. 1099 (1981) (hereinafter cited as "Page").

all derived from, or exist in, subordination to one or the other of these." *United States v. Kagama*, 118 U. S. 375, 379, 30 L. Ed. 228, 6 S. Ct. 1109 (1886) (emphasis added).

102 S. Ct. at 842.

Notwithstanding the fact that the Pennsylvania Horse Racing Commission, like a municipality, is an "organized bod[y] with limited legislative functions" which is derived from and subordinate to the legislature of the Commonwealth of Pennsylvania, the Court of Appeals chose not to apply the holding of *Boulder* to the case at bar. There is no principled basis in the precedents of this Court for distinguishing between state agencies and municipalities—both creations of the sovereign—for the purpose of applying the state action exemption. As this Court has held, "not every act of a state agency is that of the State as sovereign." *City of Lafayette v. Louisiana Power & Light Co.*, 435 U. S. 389, 410 (1978).[7]

In *Boulder* this Court noted that "the availability of the *Parker* exemption is and must be a matter of federal law." 102 S. Ct. at 841, n. 15. The Third Circuit's decision would nullify this principle and convert the availability of the *Parker* exemption to a question of whether an agency is acting within its authority as a matter of *state* law. 677 F. 2d at 996, n. 6 (P. App. A9).

This Court's decision in *Goldfarb* also suggests that state agencies acting within their powers under state law may be subject to the antitrust laws. In *Goldfarb*, the respondent Virginia State Bar Association was "a state agency by law," at least for "some limited purposes." 421

7. "[N]othing inherent in the nature of the administrative process itself offers an independent basis for according administrative bodies special deference," in applying the *Parker* doctrine because "administrative bodies, like cities, must derive whatever authority they have from the state." Page, *supra*, at p. 1129.

U. S. at 790, 791. Among the powers granted the State Bar was the power to issue ethical opinions, 421 U. S. at 791; the issuance of ethical opinions regarding fee schedules was the primary anticompetitive activity for which the State Bar was challenged. Although the issuance of ethical opinions was within the State Bar's powers as a matter of state law (and apparently, therefore, one of the purposes for which it was a state agency), the Court nevertheless held that the restraint created by the State Bar's exercise of those powers was not exempt from the application of the antitrust laws. The basis for that decision was concisely stated: "[i]t is not enough that, as the County Bar puts it, anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign." 421 U. S. at 791.

In *Goldfarb*, the state agency was empowered, as a matter of state law, to take "the kind of action complained of" in the sense that it had the authority to issue ethical opinions. There was, however, no indication—clear, express or otherwise—that the sovereign contemplated "the kind of action complained of" in the sense that it contemplated anticompetitive restraints in the market at issue. The challenged actions were therefore not entitled to exemption; the same result should obtain in this case.

C. The Petition Presents an Important Question of Federal Law Which Should Be Specifically Addressed by This Court.

The fundamental flaw in the analysis of the Court of Appeals is that exemption depends not on a conscious decision of the state policymaker, but on the breadth of the delegation from the policymaker to the subordinate state agency. *Parker* contemplates the sacrifice of federal policy favoring competition to federalism; it does not con-

template the sacrifice of federal policy to state administrative convenience.[8] The instant action provides the Court with an opportunity to clearly establish this point.

The last seven years have produced substantial and sometimes confusing developments in the relationship between the antitrust laws and the principles of "our Federalism." The resolution of many specific questions regarding the *Parker* doctrine and federal preemption of state regulation has clarified this relationship somewhat, but several complex analytical problems are yet to be resolved. Among those questions is the extent to which actions of state regulatory agencies must conform with the paramount federal policy favoring competition. As petitioners have explained above, they submit that the Third Circuit's analysis is at odds with the principles laid down in this Court's prior decisions with respect to private parties and municipalities; however, the application of *Parker* to state agencies has not been expressly delineated.

The Court of Appeals below avoided any express consideration of the competing arguments on this issue, holding that Parker precludes application of the antitrust laws to actions of a state regulatory agency acting within a broad delegation of authority from the legislature. In short, the Court of Appeals determined that state agencies acting properly as a matter of state law need not abide by the antitrust laws.

The importance of this issue as a matter of federalism is illustrated by the conflict between the Third Circuit's analysis and the positions taken by the Attorney General

8. Professor Page states that this Court's decisions "requir[e] states clearly to express clearly their regulatory choices as sovereigns, rather than through administrative agencies," Page, *supra* at p. 1101,, and that the *Midcal* test of clear articulation "recognizes only a state's legislation or rulings of its highest court as authoritative sources of state regulatory policy." *Id.* at 1118. *See Ronwin*, 1981-2 Trade Cas. ¶ 64,414 at p. 75,030.

of the United States, as well as positions taken by attorneys general of many states, on similar questions. Within the past six months the United States Department of Justice has reaffirmed the position it took in *Texas State Board* in threatening suit against certain anticompetitive rules of the West Virginia Board of Accountancy; the Department of Justice refrained from filing suit only after receiving assurances that the rules in question would be rescinded. *See* Trade Reg. Report (CCH) No. 542 (May 17, 1982), p. 10. Several state attorneys general have opined that rules promulgated by state agencies within broad grants of authority would not be shielded by the *Parker* doctrine. *See, e.g., Opinion of the Attorney General of Delaware*, Opinion No. 80F-006, 1980-1 Trade Cas. (CCH) ¶ 63,259 (March 20, 1980);[9] *Opinion of the Attorney General of Vermont*, Opinion No. 24-80, 1979-2 Trade Cas. (CCH) ¶ 62,912 (September 6, 1979). The conflict between the determination of the Court of Appeals and federal enforcement policy (as well as the opinions of various state attorneys general) underscores the need for a definitive determination by this Court of the question presented in this petition.

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9. In an opinion requested by two state legislators regarding the impact of *Midcal* on Delaware's retail price maintenance system for liquor, Delaware's Deputy Attorney General William E. Kirk, III, wrote:

> Although the Alcoholic Beverage Control Commission is empowered by statute to promulgate rules to establish control over the business of the sale of liquor in Delaware, including the time, place, and manner of sale [4 Del. C. § 304(a)(2) and (5)], we do not believe the statute provides a clear and affirmative articulation of a state policy in favor of resale price maintenance, nor do we believe that a reviewing court would find such an articulation. In the absence of a statute directing such a system, we believe that the first test under *Midcal* is not met.

1980-1 Trade Cas. (CCH) ¶ 63,259 at p. 78-276.

CONCLUSION

For all of the foregoing reasons, petitioners request that the petition for a writ of certiorari be granted.

Respectfully submitted,

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